Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1998

HARRIMAN G. RADFORD,

Petitioner

V.

GENERAL DYNAMICS CORPORATION, et al.,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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November 1998

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QUESTION PRESENTED

1)On a complaint brought by an ERISA plan beneficiary under 29 U.S.C. § 1132 (a)(3) seeking appropriate relief for a breach of a fiduciary duty by a plan fiduciary, where the plan provides administrative remedies, is the applicable Statute of Limitations tolled while the beneficiary exhausts the administrative remedies process?

LIST OF PARTIES

Petitioners from Judgment Below

Harriman G. Radford

Respondents [1]

General Dynamics Corporation;
General Dynamics Plan for Salaried Employees;
General Dynamics Plan for Hourly Employees;
Lockheed Retirement Plan for Certain Salaried Employees; and,
Retirement Plan Committee of the Lockheed Retirement Plan for Certain Salaried Employees.

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[1]/While no longer parties to the case below, the following parties were formerly parties to the underlying litigation:

1. Lockheed-Martin Corporation

2. Lockheed Corporation Plan for Employees

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner herein prays that a Writ of Certiorari issue to the United States Court of Appeals for the Fifth Circuit to review that Court's August 18, 1998 Judgment and Opinion in this proceeding.

OPINIONS BELOW

The Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit entered August 18, 1998, and from which review is sought, are reported at 151 F.3d 396 (5th Cir. 1998), and are attached in the Appendix to this Petition at page 1a.

The Judgment and Memorandum Opinion of the United States District Court for the Northern District of Texas entered on May 28, 1997, and from which Petitioner appealed, are unreported, and are attached in the Appendix to this Petition at pages 15a-17a.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered the Opinion and Judgment from which Review is sought on August 18, 1998. Jurisdiction is conferred upon this court by 28 U.S.C. §254(1).

STATUTES AND RULES INVOLVED

This case arises under the fiduciary duties imposed upon Plan Fiduciaries by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1104(a) (ERISA § 404(a)) enforced via 29 U.S.C. § 1132(a)(3) (ERISA § 502(a)(3)). The Question presented involves whether the limitations period of 29 U.S.C. § 1113 (ERISA § 413) are tolled while the beneficiary exhausts the Plan administrative remedies provided under 29 U.S.C. § 1133 (ERISA § 503). These Statutes are reprinted in the Appendix to this Petition at pages 18a to 20a.

STATEMENT OF THE CASE

This case arises out of the provision in writing by the General Dynamics, in its role as an ERISA Plan fiduciary, of incorrect and obsolete ERISA Plan information to one of its plan beneficiary employees, Radford, in 1988. Relying upon this incorrect information Radford retired earlier than he would have if he had been provided the correct information, and suffered a drastic reduction in his retirement benefits. On October 17, 1996, after finally exhausting his plan provided administrative remedies with both General Dynamics and its successor Lockheed, Radford filed his original complaint complaining of General Dynamics Corporation ("General Dynamics"); General Dynamics Plan for Salaried Employees ("General Dynamics Salaried Plan"); General Dynamics Plan for Hourly Employees ("General Dynamics Hourly Plan"); Lockheed-Martin Corporation (formerly known as Lockheed Corporation) ("Lockheed"); and Lockheed Corporation Plan for Employees in the United States District Court for the Northern District of Texas, Fort Worth Division. On December 20, 1996 Radford filed his first amended original complaint against General Dynamics, General Dynamics Salaried Plan, General Dynamics Hourly Plan, Lockheed Retirement Plan for Certain Salaried Employees ("Lockheed Plan"); and Retirement Plan Committee of the Lockheed Retirement Plan for Certain Salaried Employees ("Retirement Plan Committee") which non-suited the claims against Lockheed proper, and cor-

rected a misnomer of the appropriate Lockheed ERISA entity to serve as defendant in this cause. Radford asserted, inter alia, claims for recalculation of his benefits under the plan, equitable relief for breach of fiduciary duty, and negligence in the performance of the fiduciary duties. [R 1-71, 79-89]. The various Defendants all filed Motions to Dismiss Radford's claims pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. [R 74-78, R 97-103]. Radford responded to both Motions on January 7, 1997. [R 105-165]. The Defendants filed Replies to the Response of Radford. [R 166-171, 172-178].

On May 28, 1997 the trial Court issued an Order granting the Motions to Dismiss on the sole ground that the Plaintiff's original Complaint was filed on October 17, 1996 and was barred by the six year statute of limitations codified at 29 U.S.C. § 1113(a)(1)(A) (ERISA § 413), concluding that the last action which constituted a part of the breach or violation occurred prior to January 9, 1989. Pet. App. at p. 15a-16a. Radford timely filed his appeal to the Fifth Circuit.

The Fifth Circuit majority opinion and dissent were filed with on August 18, 1998. Pet. App. at p. 1a, 151 F.3d at 396. The majority held that ERISA § 413 provides the statute of limitations for *Varity* claims for the breach of a fiduciary duty. Pet. App. at p. 6a-7a, 151 F.3d at 399. The majority assumed, without deciding, that exhaustion of administrative remedies is required before the assertion of *Varity* claims. Pet. App. at p. 8a, 151

F.3d at 399-400. The majority held that ERISA § 413 is a statute of repose, and that it is not tolled while a beneficiary exhausts any administrative remedies. Pet. App. at p. 8a, 151 F.3d at 400.

Justice Parker dissented, and would hold that the ERISA § 413 statute of limitations should be tolled during the exhaustion of the administrative remedies. Pet. App. at p. 10a-14a, 151 F.3d at 400-401. He disagreed with the Fifth Circuit's prior authority requiring exhaustion of remedies, but recognized that because of that prior authority the failure to toll limitations while the beneficiary exhausted the administrative remedies would cause a number of unfair and inefficient results. Pet. App. at p. 13a-14a, 151 F.3d at 400-401. The Fifth Circuit denied Radford's Motion for Rehearing en banc on September 21, 1998. Pet. App. at 18a.

The present Petition for Writ of Certiorari followed.

REASONS FOR GRANTING THE WRIT

I. The question of whether the applicable statute of limitations is tolled while an ERISA plan beneficiary exhausts administrative remedies prior to the filing of a Varity claim for the breach of a fiduciary duty represents an important question which has not been, but should be, decided by the Supreme Court.

When the United States Supreme Court held that individual ERISA plan participants possessed a personal cause of action for breach of fiduciary duty against ERISA plan administrators it did not address the question of which statute of limitations governed such claims or whether

the statute of limitations was subject to tolling while the beneficiary exhausted any administrative remedies provided under the plan. *Varity Corporation v. Howe*, 516 U.S. 489, 116 S.Ct. 1065, 134 L.Ed. 130 (1996).

The Fifth Circuit faced the novel question of whether the statute of limitations applicable to a breach of fiduciary duty claim is tolled while an individual plaintiff is pursuing his administrative remedies in good faith. The majority ruled that the pursuit of administrative remedies does not toll the statute of limitations. Pet. App. at p. 9a, 151 F.3d at 400.

However, the Fifth Circuit has previously held, based in part upon the legislative history of ERISA, that plan beneficiaries are required to exhaust all administrative remedies before turning to the courts for relief for the denial of benefits. *Denton v. First National Bank of Waco, Texas*, 765 F.2d 1295 (5th Cir. 1985). The Fifth Circuit later extended this rule to apply to claims for breach of fiduciary duty. *Simmons v. Wilcox*, 911 F.2d 1077, 1081 (5th Cir. 1990). Other Circuits have also held that beneficiaries must exhaust their administrative remedies before bringing claims in court. *See, e.g., Amato v. Bernard*, 618 F.2d 559, 567 (9th Cir. 1980).

As Justice Parker recognized in his dissent, without tolling the statute of limitations, the procedure envisioned by the majority that requires a beneficiary to exhaust administrative remedies is anathema to judicial economy. Pet. App. at p. 11a, 151 F.3d at 401. In fact this proposed procedure

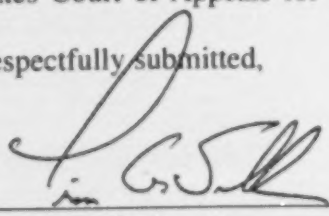
undermines the most important policy reason identified by courts in establishing the exhaustion requirements. Pet. App. at p. 11a, 151 F.3d at 401. *See, Hall v. National Gypsum Co.*, 105 F.3d 225, 231 (5th Cir. 1997). The Circuits and Congress have recognized that requiring a plan beneficiary to exhaust administrative remedies before bringing a claim for denial of benefits lightens the burden of the courts by providing an opportunity for plans and beneficiaries to correct many mistakes without the need for Court intervention, and without the Plan expending Plan assets for litigation costs and expenses. *See, e.g., Byrd v. Mac Papers, Inc.*, 961 F.2d 157, 160 (11th Cir 1992); *Makar v. Healthcare Corp. of MidAtlantic (CoreFirst)*, 872 F.2d 80, 83 (4th Cir. 1989); *Mason v. Continental Group, Inc.*, 763 F.2d 1219, 1227 (11th Cir. 1985) *cert. denied*, 474 U.S. 1087 (1986); *Amato*, 618 F.2d at 567.

On a practical level the Majority's holding will also encourage inequitable results. Plans will be in a position to delay the final resolution of the beneficiary's complaint until the ERISA § 413 statute of limitations has expired. The Plan can then deny the beneficiary's claim without fear that the beneficiary can seek justice in the courts.This ill-advised departure from the tolling principles of the exhaustion of remedies doctrine in the evaluation of *Varity* claims warrants corrective action by the Supreme Court without further delay.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that a Writ of Certiorari issue to review the August 18, 1998 Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,



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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-10689

HARRIMAN G. RADFORD,

Plaintiff-Appellant,

VERSUS

GENERAL DYNAMICS CORPORATION, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
For the Northern District of Texas

Before KING, BARKSDALE, and PARKER,
Circuit Judges.

PER CURIAM:

Appellant Harriman G. Radford appeals from the order of the district court granting Appellees' motion to dismiss on statute of limitations grounds in this ERISA case. Finding no error, we affirm.

Background

Harriman Radford worked for General Dynamics in Fort Worth for 33 years and 9 months. On November 4, 1988, Radford went to

Employee Services at General Dynamics to inquire about the effect of retiring a few months prior to age fifty-five, the first age at which General Dynamics employees can take "early retirement." The benefits office employee provided Radford a booklet entitled "General Dynamics Retirement Plan for Salaried Employees" dated June 1984. The Booklet provided that if an employee retired prior to age fifty-five, the employee would experience an actuarial reduction in benefits; however, the booklet did not state the amount of the actuarial reduction in benefits.

General Dynamics provided Radford with an out-of-date booklet. A current booklet with the same title, but dated September 1988, was available and in stock, but was not given to Radford. The 1988 Booklet contained information that would have apprised Radford of the drastic reduction in benefits which would occur if he were to retire prior to age fifty-five.

In order to ascertain the amount of the reduction, Radford returned to Employee Services on November 9, 1988, and spoke with a different benefits office employee. Radford told the benefits office employee that he was considering retiring prior to age fifty-five and that he needed to determine the amount of his monthly retirement benefit he would receive at age fifty-five if he retired at age fifty -four and five months. The benefits office employee informed him that the actuarial reduction would be 4.5%.

On December 20, 1988, Radford received from General Dynamics two *Retirement Benefits Payment Election* forms: one for salaried employees and one fro hourly employees. Radford was eligible for benefits under both plans. By electing a monthly benefit under a life annuity, the salaried employee plan form advised that Radford would receive a monthly benefit of $617.92, and the hourly employee plan form advised that Radford would receive a monthly benefit of $215.00 Both forms indicated that the approximate benefits shown were based on an anticipated retirement age of fifty-five years. Attached to these payment election forms was a post-it note to call "Billie" in Employee Services.

Radford called Billie and discussed his date of retirement and the fact that the monthly benefit amounts indicated on the election forms were the same amount if he were to retire at age fifty-five. Radford advised Billie that another benefits office employee had advised him that this amount would be reduced actuarially by 4.5%. Billie advised Radford that the other employee must have calculated the amount under the alternate benefit formula as opposed to the regular benefits formula, and that under the rules Radford would receive the higher of the two.

Based upon these written and oral representations, Radford retired from General Dynamics at age 54 years and 4 months on January 6, 1989. He was under the impression that he would be receiving a total monthly income of over $800.00. Instead, "on January 9, 1989, Radford learned that the

General Dynamics Corporation benefits office employees had misrepresented to him what his benefits would be under the General Dynamics Plans if he retired prior to age fifty-five."[1] His monthly income amounted to $301.00, and he lost his medical insurance. Radford elected not to receive any benefit until this matter was fully adjudicated.

Radford immediately initiated an administrative claim for higher benefits with General Dynamics Corporation and its Plans. Some years later, Radford also filed an administrative claim with Lockheed, [2] seeking relief on the basis of the alleged misrepresentations made by General Dynamics Corporation benefits employees. Lockheed denied Radford's appeal on December 16, 1994.

Radford filed his Original Complaint on October 17, 1996, alleging breach of fiduciary duty under ERISA. General Dynamics and Lockheed moved to dismiss Radford's ERISA claim as time-barred. The district court granted the motions to dismiss, holding that the last action which constituted a part of the breach or violation occurred prior to January 9, 1989, ant that Radford's complaint filed on October 17, 1996, was barred by §413 of ERISA's six-year statute of limitations. Radford timely filed a notice of appeal.

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[1]Brief of Appellee General Dynamics Corp. at p. 8-9

[2]On March 1, 1993, Lockheed Corporation purchased the Fort Worth Division of General Dynamics pursuant to a purchase agreement. The Lockheed Plan assumed the fiduciary duties and responsibilities rights, and obligations of the General Dynamics Plans.

Analysis

We review a district court's ruling on a motion to dismiss for failure to state a claim *de novo*. *Morin v. Caire*, 77 F. 3d 116, 120 95th Cir. 1996). The parties do not dispute that Radford has asserted a breach of fiduciary duty claim under §502 (a) (3) of ERISA as recognized in *Varity v. Howe*, 116 S. Ct. 1065 (1996).[3] In *Varity*, the Supreme Court recognized that §502 (a) (3) of ERISA, 29 U.S.C. § 1132 (a), authorizes lawsuits for individualized equitable relief for breach of fiduciary obligations. In order to review the district court's ruling, we must address the following issues of first impression: (1) what is the statute of limitations for a *Varity* claim; and (2) if the lawsuit was filed outside the limitations period, should the statute of limitations be tolled while administrative remedies are being exhausted.

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[3]The court notes that *Varity* involved intentional misrepresentations to employees, and that in this case, Radford alleges negligent misrepresentation by General Dynamics. See *Librizzi v. Children's Memorial Med. Ctr.*, 134 F. 3d 1302, 1305 (7th Cir. 1998) (noting that uninformed but well-meaning advice poses a different problem from the intentional deceit involved in *Varity).* As the parties do not dispute that a *Varity* claim has been stated, the court does not address whether Radford's claim is indeed a *Varity* claim.

I. Statute of limitations for a *Varity* Claim

The district court found, and Appellees Lockheed and General Dynamics maintain, that the limitations period for a *Varity* claim can be found in § 413 of ERISA. Section 413 provides in pertinent part:

> No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of - -
>
> (1) six years after (A) the date of the last action which constituted a part of the breach or violation, or . . .
> (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation;
>
> except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

29 U.S.C. § 1113 9and. 1989) (Supp. 19970 (emphasis added).

The court agrees. The plain language of § 413 of ERISA indicates that its statute of limitations would apply to a *Varity* claim pursuant to § 502 (a) (3). The *Varity* court explained that the fiduciary duties which were violated arose under § 404 (a) of ERISA. 116 S. Ct. at 1074-75. Section 413 provides that any action "commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part" is subject to either the six-year or three-year statute of limitations, whichever is earlier. Both § 413 and § 404 (a) are contained in Subchapter I, subtitle B, Part 4 of ERISA. A *Varity* claim for breach of fiduciary duty arises under § 404 9a) and § 502 (a) (3), both within Subchapter I of ERISA.

Radford stated in his complaint that he "learned to his dismay" that the information was incorrect on january 9, 1989. Thus under either the three year or six year limitations period, Radford's claim filed on October 17, 1996, is time-barred. However, it is clear that the three-year period applies because it is the earlier of the two periods outlined in § 413. In a similar case, the Seventh Circuit concluded that § 413 provides the limitations period for a case assumed to lie under *Varity*. See *Librizzi v. children's Memorial Med. Ctr.*, 134 F.3d 1302 (7th Cir. 1998).

II. Tolling the Statute of Limitations

The next question we must answer is whether the statute of limitations should be tolled while administrative remedies are being exhausted. This question presupposes that a requirement exists to exhaust administrative remedies in cases under *Varity*. If there is no exhaust requirement, there is no need to toll the statute. *See Lindahl v. American Telephone & Telegraph*, 609 F. Supp 267 (N.D. Ill. 1985)

Radford maintains that exhaustion is required before a *Varity* claim can be filed, citing *Denton v. First Nat'l Bank of Waco*, 765 F.2d 1295 95th Cir. 1985). In Denton, this court adopted the rule that a plaintiff generally must exhaust administrative remedies afforded by an ERISA plan before suing to obtain benefits wrongfully denied.

During oral argument, General Dynamics argued that there should be no exhaustion requirement in fiduciary breach cased under ERISA and that

fiduciary breach cases are distinguishable from benefit denial cases like *Denton*. However, this court held in *Simmons v. Wilcox*, 911 F.2d 1077, 1081 95th Cir. 19900, that a plaintiff must exhaust administrative remedies before complaining of a breach of fiduciary duty under ERISA. *See also Maker v. Health Care Corp. of Mid-Atlantic*, 872 F.2d 80 (4th Cir. 1989). *Cf. Kross v. Western Elec. Co.*, 701 F.2d 1238, 1244-45 (7th Cir. 1983) (Exhaustion is discretionary with the district court).

However, we can assume without deciding that exhaustion for *Varity* claims is required in this circuit, because we do not find it necessary to toll the statute of limitations pending the exhaustion of administrative remedies. Section 413 of ERISA is a statute of repose, establishing an outside limit of six years in which to file suit, and tolling does not apply. *See Lampf v. Gilbertson*, 501 U.S. 350, 363 (1991) holding that a similar provision under the Securities Exchange Act of 1934 was not subject to tolling "[b]ecause the purpose of the three-year limitation is clearly to serve as a cutoff"). *Accord Wolin v. Smith Barney, Inc.*, 83 F.3d 847, 850 (7th Cir. 1996); *Landwehr v. DuPree*, 72 F.3d 726, 733 (9th Cir. 1995); *Larson v. Northrop Corp.*,21 F.3d 1164, 1174-77 (D.C. Cir. 1994). As a statute of repose, § 413 serves as an absolute barrier to an untimely suit.

Additionally, we note that pursuant to ERISA administrative claims regulations, 29 C.F.R. § 2560.503-1 9e) (2) and (h) (4) (1997), promulgated

by the Secretary of Labor under 29 U.S.C. §1133, administrative review of a claim is deemed denied after a total of 300 days have passed from the date the claim wa filed. Radford's claim was filed on January 9, 1989, and was constructively denied, pursuant to the above regulations on November 6, 1989. These regulations reinforce the view that § 413 is a statute of repose.

We conclude that the statute of limitations is not tolled during exhaustion of administrative remedies for *Varity* claims under ERISA. Accordingly, Radford's *Varity* claim is time-barred.

For the foregoing reasons, the judgment of the district court is AFFIRMED.

ROBERT M. PARKER, Circuit Judge, dissenting:

I respectfully dissent. I begin by noting that the exhaustion requirement is not present in the statute- -it has been created out of thin air. As the majority points out, in *Denton* this court adopted the rule that a plaintiff generally must exhaust administrative remedies afforded by an ERISA plan before suing to obtain benefits wrongfully denied.[1] *But see Held v. Manufacturers Hanover Leasing Corp.*, 912 F. 2d 1197, 1205 910th Cir. 1990); *Zipf v. American Tel. &Tel. Co.*, 799 F.2d 747, 750-53 (9th Cir. 1984) (exhaustion not required for claims of statutory violations of ERISA).

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[1]The Denton court relied upon a Ninth Circuit decision, *Amato v. Bernard*, 618 F.2d 559 (9th Cir. 1980), involving a claim for declaration of rights under a plan. The Ninth Circuit distinguished *Amato* in *Amaro v. Continental Can Co.*, 724 F.2d 747, 751-52 (9th Cir. 1984), by pointing out that the pension plan in *Amato* contained the internal appeal procedure required by section 503 of ERISA. The *Amaro* court concluded that exhaustion would not be required to bring an action under § 510 of ERISA, and that *Amato* did not apply.

The difference between Amato (cited in Denton) and *Amaro* is that *Amato* involved a dispute about the rights and duties under the plan for which exhaustion would be required; *Amaro* involved a dispute as to whether the statute had been violated, so that exhaustion of administrative remedies would not be required. The en banc court may wish to reexamine *Denton* and its progeny to make a distinction with respect to the exhaustion requirement between cases involving rights under a plan and rights under ERISA. *Cf. Chailland v. Brown & Root, Inc.*, 45 F.3d 947, 950 95th Cir. 1995) ("Our cases applying this common law exhaustion requirement presuppose that the grievance upon which the lawsuit is based arises from some action of a plan covered by ERISA, and that the plan is capable of providing the relief sought by the plaintiff.")

After *Denton*, this court held in *Simmons v. Wilcox*, 911 F.2d 1077, 1081 (5th Cir. 1990), that a plaintiff must exhaust administrative remedies before complaining of a breach of fiduciary duty under ERISA. There is no reason why exhaustion should not be required for a Varity claim for breach of fiduciary duties, when this circuit has required it for other breach-of-fiduciary-duty claims and benefit-denial claims under ERISA. There is no principled reason for treating *Varity* claims differently. I recognize that exhaustion is the law of the circuit, and we are bound by that precedent.

Where the majority and I part ways is with respect to the tolling issue. If we require exhaustion of administrative remedies for claims under Varity which we must under existing circuit precedent, then we must also hold that the statute of limitations will be tolled during the pendency of the administrative process.[2] Although the Appellees contend and the majority agrees that a plaintiff should be required to both exhaust administrative remedies and file suite within the limitations period, I consider such a procedure anathema to judicial economy.

According to the Appellees, even if suite is filed before administrative

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[2]Radford had actual knowledge of the alleged breach on January 9, 1989. Radford avers that he immediately initiated an administrative claim, and that his administrative claim was denied by Lockheed don December 16, 1994. Radford filed suit on October 17, 1996. Thus, if the statute of limitations is tolled during exhaustion of administrative remedies, his suit under ERISA is not time-barred for purposes of a motion filed pursuant to Rule 12 (b) (6).

procedures have concluded, the case can be stayed in federal court until it is ripe for decision. Not only does this create a potentially unnecessary step in the judicial process, but it also undermines the policy reasons supporting an exhaustion requirement: (1) minimizing the number of frivolous ERISA suits; (2) promoting th consistent treatment of benefit claims; (3) providing a nonadversarial dispute resolution process; (4) decreasing the time and cost of claims settlement; (5) providing a clear record of administrative action if litigation should ensue; and (6) assuring that judicial review is not made under a *de novo* standard. *See Hall v. National Gypsum Co.*, 105 F.3d 225, 231 (5th Cir. 1997).

The only other court to have addressed this precise issue concluded that the limitations period would be tolled while the plaintiff exhausted administrative remedies. *See Mitchell v. Shearson Lehman Brothers, Inc.*, 1997 WL 277381 (S.D.N.Y. 1997). The court reasoned that such a conclusion was the only way to avoid unfairness to the plaintiff and that it was "simply illogical to say that a claim has accrued if it is automatically subject to dismissal when filed." 1997 WL 277381, *5.

The majority cites a Supreme Court decision, Lampf, and three circuit court decisions, Wolin, Larson, and Landwehr in support of its position that the court should not toll the limitations period. In *Lampf* the Supreme Court held that § 9 (e) of the Securities Exchange Act of 1934 was

a statute of repose not subject to equitable tolling. In so holding, the Court rejected the argument that tne statute of limitations should not begin to run until the party who is a victim of fraud or concealment discovers his injury. Likewise in *Wolin* and *Larson*, the issue with respect to equitable tolling involved the discovery rule. *Landwehr* merely stands for the proposition that "the limitations period in an ERISA action begins to run on the date that the person bringing suit learns of the breach or violation." 72 F.3d at 732. *Landwehr* left open the possibility that if someday a case arose in which the application of the general rule would frustrate the purpose of ERISA, the rule would be applied in a manner that would not permit such a result. 72 F.3d at 733. These cases are distinct from the situation presented in the case *sub judice* wherein this court has legislated an additional requirement of exhaustion not expressly provided in the statute.

If our circuit case law would allow us to hold that there is no exhaustion requirement for a *Varity* claim, then I would wholeheartedly agree with the majority that the statute of limitation in § 413 of ERISA should not be tolled. But instead, our circuit has read into ERISA an exhaustion requirement where it does not expressly exist. Common sense and basic fairness dictates that if we are willing to read in an exhaustion requirement, we must toll the limitations period while exhaustion occurs. I also take issue with the majority's reference to and back-door application of the 300-day rule--

an argument raised by General Dynamics for the first time on appeal. I would hold that the statute of limitations would be tolled while the plaintiff exhausts his court-mandated administrative remedies and reverse and remand the case for further proceedings.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

HARRIMAN G. RADFORD	§	
	§	
VS.	§	ACTION NO. 4:96-CV-733-Y
	§	
GENERAL DYNAMICS CORPORATION, ET AL.	§	

ORDER GRANTING MOTIONS TO DISMISS

Pending before the Court is the Motion to Dismiss with Supporting Brief filed on December 19, 1996 by defendants Lockheed Retirement Plan for Certain Salaried Employees and Retirement Plan Committee of the Lockheed Retirement Plan for Certain Salaried Employees ("the Lockheed defendants"). Also pending before the Court is the Amended Motion to Dismiss with Supporting Brief filed on December 30 by defendants General Dynamics Corporation, General Dynamics Plan for Salaried Employees, and General Dynamics Plan for Hourly Employees 9"the General Dynamics defendants"). Plaintiff filed a joint response in opposition to both motions on January 7, 1997. The Lockheed defendants filed a reply to Plaintiff's response on January 17, and the General Dynamics defendants filed their reply to Plaintiff's response on January 23. After review and consideration of the foregoing documents, Plaintiff's First Amended Original Complaint, and the applicable law, the Court finds that the motions should be granted. Specifically, the Court finds that the statute of

limitations set forth in 29 U.S.C. § 1113 applies to Plaintiff's claims. The Court further finds that the allegations contained in plaintiff's First Amended Original Complaint make clear that the last action which constituted a part of the breach or violation about which he complains occurred prior to January 9, 1989. Because Plaintiff's original complaint was not filed until October 17, 1996, his claims are barred by the six-year statute of limitations contained in 29 U.S.C. § 1113 (a) (1) (A).

It is, therefore, ORDERED that the Lockheed defendants' Motion to Dismiss [document number 4-1] is hereby GRANTED.

It is further ORDERED that the General Dynamics defendant's Amended Motion to Dismiss [document number 7-1] is hereby GRANTED.

SO ORDERED.

SIGNED May 27, 1997.

TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

HARRIMAN G. RADFORD	§	
	§	
VS.	§	ACTION NO. 4:96-CV-733-Y
	§	
GENERAL DYNAMICS CORPORATION, ET AL.	§	
	§	

FINAL JUDGMENT

In accordance with the order issued this same day and Federal Rule of Civil Procedure 58,

It is hereby ORDERED, ADJUDGED, and DECREED that all claims in the above-styled and numbered cause are hereby DISMISSED WITH PREJUDICE to the refiling of same. all costs of court shall be borne by the party incurring same.

SO ORDERED.

SIGNED May 27, 1997.

TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE FIFTH CIRCUIT

NO. 97-10689

HARRIMAN G RADFORD

Plaintiff - Appellant

v.

GENERAL DYNAMICS CORPORATION; GENERAL DYNAMICS PLAN FOR SALARIED EMPLOYEES; GENERAL DYNAMICS PLAN FOR HOURLY EMPLOYEES; LOCKHEED RETIREMENT PLAN FOR CERTAIN SALARIED EMPLOYEES; RETIREMENT PLAN COMMITTEE OF THE LOCKHEED RETIREMENT PLAN FOR CERTAIN SALARIED EMPLOYEES

Defendants - Appellees

Appeal from the United States District Court forth
Northern DIstrict of Texas, Fort Worth

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 8/18/98, 5 Cir., _____, _____ F.3d _____)

Before KING, BARKSDALE and PARKER, Circuit Judges.

PER CURIAM:

(X) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of th panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (Fed. R. App. P. and 5th Cir. R. 35), the Suggestion for Rehearing En Banc is DENIED.

( ) Treating the Suggestion for Rehearing en Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (Fed. R. App. P. and 5th Cir. R. 35), the Suggestion for rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

STATUTES AND RULES INVOLVED

Section 1104, Title 29, United States Code provides as follows:

(a) Prudent man standard of care. (1) Subject to sections 403 (c) and (d) [29 USCS § 1103 (c) and (d)], 4042 [29 USCS § 1342], and 4044 [29 USCS § 1344], a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and -

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title IV.

Section 1113 Title 29, United States Code provides as follows:

No action may be commenced under this title with respect to a fiduciary's breach of any responsibility, duty or obligation under this part, or with respect to a violation of this part, after the earlier-

(1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation, or

(2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation;

except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

Section 1132, Title 29, United States Code provides as follows:

(a) Persons empowered to bring a civil action. A civil action may be brought-

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of this plan.

Section 1133, Title 29, United States Code provides as follows:

In accordance with regulations of the Secretary, every employee benefit plan shall

(1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and

(2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.